

**EMPLOYMENT STANDARDS TRIBUNAL**  
In the matter of an appeal pursuant to Section 112 of the  
*Employment Standards Act*

- by -

Econowise Office Furniture Ltd.  
"Econowise ")

- of a Determination issued by -

The Director Of Employment Standards  
(the "Director")

**ADJUDICATOR:** Hans Suhr

**FILE NO.:** 96/206

**DATE OF DECISION:** May 21, 1996

## DECISION

### OVERVIEW

This is an appeal by Econowise pursuant to Section 112 of the *Employment Standards Act* (the “Act”), against Determination No. CDET 001492 issued by the Director of Employment Standards (“Director”) on March 11, 1996. In this appeal Econowise claims that no compensation for length of service is owed to James MacKenzie (“MacKenzie”) pursuant to Section 63 of the *Act*.

Consideration of this appeal falls under the transitional provisions of the *Act*. Section 128 (4), (5) & (6) state:

- (4) Subject to subsection (5) and (6) section 63 applies to an employee whose employment began before section 63 comes into force and is terminated after that section comes into force.
- (5) An employer is liable to pay to an employee referred to in subsection (4), as compensation for length of service, an amount equal to the greater of the following:
  - (a) the number of week’s wages the employee would have been entitled to under section 42 (3) of the former Act if the employment had been terminated without compliance with section 42 (1) of this Act.
  - (b) the amount the employee is entitled to under section 63 of this Act.
- (6) The employer’s liability to an employee referred to in subsection (4) for compensation for length of service is deemed to be discharged if the employee is given notice according to section 42 (1) of the former Act or according to section 63 (3) of this Act, whichever entitles the employee to the longer notice period.

I have completed my review of the written submissions made by Econowise and the information provided by the Director.

### FACTS

MacKenzie was employed by Econowise commencing August 16, 1995 as a driver.

MacKenzie alleged that he had suffered an injury on October 25, 1995 and on October 27, 1995 he left work.

MacKenzie initiated a Worker’s Compensation Board (“WCB”) claim for lost wages when he saw his doctor on November 7, 1995.

MacKenzie visited his Doctor several times, the last being December 5, 1995 at which time his Doctor advised that he would be able to return to work on December 6, 1995.

MacKenzie's WCB claim was subsequently denied.

On December 6, 1995 Econowise received notification from the WCB that MacKenzie's claim had been denied and the same day received a telephone call from MacKenzie advising that he was now able to return to work.

Econowise terminated MacKenzie's employment on December 6, 1995.

### **ISSUE TO BE DECIDED**

The issue to be decided in this appeal is whether the employer has any liability to pay compensation for length of service pursuant to section 63 of the *Act*.

### **ARGUMENTS**

Econowise argues that:

- As MacKenzie's last actual date of work was October 27, 1995 he had not completed 3 months of employment and is therefore not entitled to compensation for length of service;
- MacKenzie's claim for WCB was "obviously fraudulent" as the claim was subsequently denied;
- MacKenzie was "abusing the system".

The Director contends that:

- MacKenzie did not quit his employment;
- he was terminated by Econowise when he attempted to return to work on December 6, 1995;
- MacKenzie had completed more than 3 months of employment;
- Econowise did not pay compensation for length of service;
- Econowise contravened section 63 (1) of the *Act*.

### **ANALYSIS**

Section 63 of the *Act* provides that "after 3 consecutive months of employment the employer becomes liable to pay ...as compensation for length of service".

It is widely accepted that the employment relationship between an employer and employee is not terminated simply because the employee is sick, injured, on vacation or on approved leave of absence from the employer. There must be some manner of action on the behalf of either the employee or the employer to terminate the employment relationship. In this particular circumstance, the employment relationship between MacKenzie and Econowise was not terminated until Econowise took steps to dismiss him on December 6, 1995.

For the above reasons I must conclude that MacKenzie had completed more than 3 consecutive months of employment at the time, December 6, 1995, that he was terminated by Econowise. Econowise is therefore liable to pay to MacKenzie 1 week's wages as compensation for length of service pursuant to section 63 of the *Act*.

I am satisfied that the calculation of the compensation for length of service performed by the Director and set forth in the determination is correct.

**ORDER**

Pursuant to Section 115 of *Act*, I order that Determination No. CDET 001492 be confirmed in the amount of \$327.99

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**Hans Suhr**  
**Adjudicator**  
**Employment Standards Tribunal**

May 21, 1996  
**Date**

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